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No. 15-446

IN THE

Supreme Court of the United States

CUOZZO SPEED TECHNOLOGIES, LLC,

Petitioner,

v.

MICHELLE K. LEE, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF PUBLIC KNOWLEDGE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Public Knowledge[1] is a non-profit organization dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property, and upholding and protecting consumers' rights to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced patent system, particularly with respect to new and emerging technologies.

Public Knowledge has previously served as *amicus* in patent cases. *E.g.*, *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, Nos. 14-1513, -1520 (U.S. argued Feb. 23, 2016); *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401 (2015); *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

SUMMARY OF ARGUMENT

1. This Court should reject the invitation to change the claim construction standard applied during *inter partes* review, because the proposed alternative is an inferior standard for that specialized proceeding.

The primary argument of Cuozzo and its supporting *amici* is that the claim construction standard applied by district courts reaches the "correct" or "actual" construction, and so the Board should use the "correct" standard. But the district court standard is far from objectively "correct." Claim construction before district courts is an

[1]Pursuant to Supreme Court Rule 37.3(a), Petitioner granted blanket consent, and Respondent consented separately. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

incomparably complex, uncertain, and unpredictable process. Words in patent claims are often construed to have meanings far from their ordinary definitions.

These counterintuitive constructions arise, at least in part, because courts seek to protect the inventive contribution of patents, even when those patents are poorly drafted. Having no power to amend patents, courts will regularly bend over backwards to construe patents in ways that preserve their value to their owners.

This willingness to favor patent owners in district court claim construction is a measured policy choice, not the objectively "correct" result. Indeed, it has led to what can only be described as a mess in the state of claim construction law, recognized by commentators and even judges of the Federal Circuit. And it suggests that the district court claim construction standard is not a rule of general applicability, but rather one that should be at most cabined to the specific forum in which it was born, namely district court litigation of patents.

Inter partes review is a significantly different proceeding, and thus it warrants a significantly different claim construction standard. The opportunity to amend evaporates the adjudicator's need to bend over backwards to use claim construction to rewrite poorly drafted patents. Furthermore, *inter partes* review was designed to advance the public interest in improving patent quality. The broadest reasonable interpretation standard, used during that proceeding, also was designed to advance the public interest in patent clarity. That standard is thus well justified for use in *inter partes* review.

The broadest reasonable interpretation standard is well suited for *inter partes* review. Petitioner's alternative is inferior and unjustified. This Court should affirm.

2. Besides being less appropriate to *inter partes* review, Petitioner's standard would have the ill effect of encouraging manipulative tactics during that proceeding, which will increase costs for all parties and subvert the mission and resources of the proceeding.

Cuozzo's litigation behavior, shown through facts presented in this brief, exemplifies this undue exploitation of process. By definition, the district court standard that Cuozzo supports cannot interpret a claim more broadly (that is, to encompass more subject matter) than the broadest reasonable interpretation. Yet, in this case, Cuozzo's patent received a narrow interpretation, and Cuozzo seeks to have the patent read to encompass more subject matter, not less.

In other words, Cuozzo is asking for a narrower claim construction standard in order to obtain a broader claim construction.

Why, then, does Cuozzo pursue this case? It cannot be to alter the outcome of the *inter partes* review, as the district court standard will leave Cuozzo's patent claims equally invalid—a broader reading of a claim cannot be valid when a narrower one is invalid for obviousness. Instead, the record reveals that Cuozzo seeks a broader claim construction in order to facilitate its infringement arguments in unrelated litigation—a manipulative attempt to commandeer *inter partes* review to ends external to the proceeding.

The district court claim construction standard opens the door to widespread engagement in such tactics. That standard, notorious for its unpredictability, will offer attorneys numerous opportunities to exploit ambiguities in patents, to draw out adjudication, and to engage in collateral interest fishing expeditions as Cuozzo did. These

tactics raise costs for all parties, and they demean the adjudicatory process. Avoidance of these possibilities further justifies affirming the Court of Appeals.

3. The odd facts of this case do not merely highlight Cuozzo's misaligned interests; they suggest that Cuozzo actually lacks standing to resolve the claim construction standard in the first place.

This Court only has jurisdiction if Cuozzo can show standing, which requires a redressable injury. But the injury here, namely invalidation of several patent claims, cannot be redressed by changing the claim construction standard. Since Cuozzo asks for a broader claim construction, its patent claims will still be as obvious and invalid as they were when the *inter partes* review proceeding initially concluded. Cuozzo cannot show that it would actually benefit from a favorable decision of this Court, and so Cuozzo lacks standing.

Lack of standing here is no mere technical defect, but rather goes to the heart of the standing doctrine itself. Standing ensures that courts do not issue advisory opinions, and more importantly that courts have a solid exemplary fact pattern upon which to rest their decisions. Cuozzo's case presents no such solid fact pattern: rather than illustrating the actual difference between the claim construction standards at issue, it illustrates an uninformative, backwards situation. Any ruling on the claim construction question would be based not on the facts of this case but rather on abstract and hypothetical statements of patent philosophy proffered by Cuozzo and *amici*. This Court should not issue such a ruling.

ARGUMENT

This brief addresses only the question presented relating to the proper standard for claim construction during *inter partes* review.

I. PETITIONER'S DESIRED CLAIM CONSTRUCTION STANDARD IS NOT APPROPRIATE FOR *INTER PARTES* REVIEW

This Court should affirm the decision of the Court of Appeals that the broadest reasonable interpretation standard for claim construction is properly applied during *inter partes* review. The competing standard, announced most prominently in the Federal Circuit's decision *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005),[2] is the one applied in district courts and the International Trade Commission during patent infringement litigation. But this standard, termed the *Phillips* or district court standard in this brief, should not be applied in *inter partes* review.

The *Phillips* standard is designed not to arrive at the "correct" claim construction, but rather to achieve policy objectives such as assisting patent owners in view of concerns about the limitations of patent litigation. *Inter partes* review presents different concerns, such as promoting the public interest in patent quality. These differences warrant a different standard for claim construction. This Court should reject Petitioners' invitation to apply an ill-fitting claim construction standard to *inter partes* review, and so it should affirm the Court of Appeals.

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[2]The standard far predates *Phillips*. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576 (Fed. Cir. 1996), applied the same standard, and *Phillips* merely reaffirmed the holding of *Vitronics*. *See Phillips*, 415 F.3d at 1312.

A. The Proffered Standard Is Not "Correct," but Rather Driven by Litigation-Specific Policy Concerns

Contrary to suggestions by Cuozzo and its supporting *amici*, the district court claim construction standard does not reflect "what claims *actually* mean."[3] Quite the opposite, the *Phillips* standard is designed not to reach the objectively correct meaning of the claim, but rather to accommodate policy interests particular to the unique nature of patent litigation, and in particular the inability of courts to rewrite patents even in view of inadvertent or careless drafting. These litigation-specific policy concerns make the *Phillips* standard only applicable to situations like district court litigation.

1. As an initial matter: despite Cuozzo's characterization, the district court claim construction standard is far from the "ordinary meaning" of the claims.

Although the ordinary meaning of a claim term carries significant weight, *Phillips*, 415 F.3d at 1312–13, courts regularly depart from that ordinary meaning. For example, the patent specification may redefine a term in a way that "differs from the meaning it would otherwise possess"; there, "the inventor's lexicography governs" rather than the ordinary meaning. *Id.* at 1316 (citing *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002)). Or the prosecution history of a patent may suggest a departure from ordinary meaning, for example "making the claim scope narrower than it would otherwise be." *Id.* at 1317 (citing *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582–83 (Fed. Cir. 1996)).

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[3] *E.g.*, Br. Pet'r 17; *see also* Br. Interdigital et al., Feb. 29, 2016 (repeatedly describing *Phillips* construction as "correct").

Numerous decisions illustrate how district court claim construction diverges greatly from ordinary meaning:

- In *Toro Co. v. White Consolidated Industries, Inc.*, the word "including" was construed to mean "permanently affixed to"—obviously not the ordinary meaning. 199 F.3d 1295, 1300–02 (Fed. Cir. 1999).

- In *Nystrom v. Trex Co.*, the term "board" was construed to encompass not any board, but rather only "wood cut from a log," despite the court recognizing that the claim language included no such requirement. 424 F.3d 1136, 1143 (Fed. Cir. 2005).

- In *Transonic Systems, Inc. v. Non-Invasive Medical Technologies Corp.*, the district court construed "calculating" and "determining" not to have their ordinary meanings of performing a calculation, but rather to require application of a specific formula for a "dilution curve." *See* 143 Fed. App'x 320, 322 (Fed. Cir. 2005). The Federal Circuit reversed, determining that the terms required application of a *different* formula. *See id.* at 327–28.

See generally Russell B. Hill & Frank P. Cote, *Ending the Federal Circuit Crapshoot: Emphasizing Plain Meaning in Patent Claim Interpretation*, 42 IDEA 1, 15–22 (2002) (noting the Federal Circuit's "[r]efusing to apply the plain and ordinary meaning to simple terms").

Indeed, the Federal Circuit has specifically admonished *against* reliance on ordinary dictionary meanings in construing claims. It has said, for instance, that "a general-usage dictionary cannot overcome credible art-specific evidence of the meaning or lack of meaning of a claim term." *Vanderlande Indus. Nederland BV v. Int'l*

Trade Comm'n, 366 F.3d 1311, 1321 (Fed. Cir. 2004). And it has "cautioned against the use of non-scientific dictionaries" in claim construction. *Dow Chem. Co. v. Sumitomo Chem. Co.*, 257 F.3d 1364, 1372 (Fed. Cir. 2001) (citing *Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1478 (Fed. Cir. 1998)). Complex and uncertain canons and rules, not "ordinary meaning," govern claim construction under *Phillips*.[4]

2. These unexpected and counterintuitive interpretations arise because the precepts of district court claim construction are aimed not so much at objective "correctness" but rather at policy objectives such as protecting patentees from the limitations of court litigation.

District courts have a very limited menu of decisions they can reach: they can declare a patent invalid or not, and they can declare a patent infringed or not. In particular, courts usually cannot revise the content of patents: "A district court can correct a patent only if, among other things, 'the error is evident from the face of the patent.'" *H-W Tech., LC v. Overstock.com, Inc.*, 758 F.3d 1329, 1333 (Fed. Cir. 2014) (quoting *Group One, Ltd. v. Hallmark Cards, Inc.*, 407 F.3d 1297, 1303 (Fed. Cir. 2005)).

Courts will use claim construction to help patent owners avoid the severity of these all-or-nothing results. This Court once said that "if the claim were fairly susceptible

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[4]That *Phillips* occasionally described its own standard as "ordinary meaning," *e.g.*, 415 F.3d at 1314, is of little moment. The court took "ordinary meaning" to refer to "the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention," *id.* at 1313, an inquiry that encompasses all the complexity described above. *See also Medrad, Inc. v. MRI Devices Corp.*, 401 F.3d 1313, 1319 (Fed. Cir. 2005) ("[W]e must look at the ordinary meaning in the context of the written description and the prosecution history.").

of two constructions, that should be adopted which will secure to the patentee his actual invention, rather than to adopt a construction fatal to the grant." *Smith v. Snow*, 294 U.S. 1, 14 (1935). More recently, the Federal Circuit has explained that the opportunity to amend claims "is not available in an infringement action in district court," and so "district courts may find it necessary to interpret claims to protect only that which constitutes patentable subject matter to do justice between the parties." *In re Yamamoto*, 740 F.2d 1569, 1572 (Fed. Cir. 1984) (citing *In re Prater*, 415 F.2d 1393, 1404 (C.C.P.A. 1969)).

Demonstrating this willingness in claim construction to bend over backwards to avoid invalidating a patent, *Exxon Research & Engineering Co. v. United States* involved a patent claim that the district court had found indefinite. *See* 265 F.3d 1371, 1374 (2001). But the Federal Circuit was willing to perform the task of construing the patent terms to save it from indefiniteness, "however difficult that task may be" and "even though that task may be formidable and the conclusion may be one over which reasonable persons may disagree." *Id.* at 1375.[5]

That willingness to undertake "formidable" claim construction efforts arises out of a desire to protect patentees from the harsh disposition of invalidation. *Exxon*

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[5]To the extent that it relied on the "insolubly ambiguous" standard for indefiniteness, *Exxon Research* was overruled by *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2130 n.9 (2014). Nevertheless, *Exxon Research* is instructive of the manner in which courts construe claims under *Phillips*. Furthermore, although *Exxon Research* itself predates *Phillips*, the command of *Exxon Research* to undertake "formidable" claim construction was repeatedly followed after *Phillips*. *See, e.g., Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343, 1350 (Fed. Cir. 2010); *see also id.* at 1348–49 (requiring 754 words to construe the word "near").

Research explained that construing even poorly drafted claims would "protect the inventive contribution of patentees, even when the drafting of their patents has been less than ideal." *Id.* And the predecessor court to the Federal Circuit cleanly summed up how claim construction could resolve the tension between limited district court capabilities and protection of patentees:

> By construing a claim as covering only patentable subject matter, courts are able, in appropriate cases, to hold claims valid in order to protect the inventive concept or the inventor's contribution to the art. The patentee at that time usually may not amend the claims to obtain protection commensurate with his actual contribution to the art."

In re Prater, 415 F.2d 1393, 1404 n.30 (C.C.P.A. 1969); *cf. Rhine v. Casio, Inc.*, 183 F.3d 1342, 1345 (Fed. Cir. 1999) (where possible, "claims should be construed to sustain their validity"), *quoted in Phillips*, 415 F.3d at 1327; *Photo Elecs. Corp. v. England*, 581 F.2d 772, 776 (9th Cir. 1978) ("[P]atent claims should be construed liberally to uphold the patent's validity rather than to destroy the inventor's right to protect the substance of his invention.").

Use of claim construction to "protect the inventive concept" is a policy choice, not mere "correctness." That policy limits the applicability of the *Phillips* standard.

B. The Volatility of That Standard Further Proves That It Is Policy-Driven

The confused and unpredictable state of claim construction law further highlights that the district court standard is driven by policy, not accuracy.

Underlining the degree to which litigation claim construction is not driven by pure correctness: in one instance, the Federal Circuit twice construed the same claim terms in the same patent, and reached two different results. *CVI/Beta Ventures, Inc. v. Tura LP*, 112 F.3d 1146, 1160 & n.7 (Fed. Cir. 1997) (comparing the decisions). Reviewing the decisions, Professor (now Federal Circuit judge) Kimberly Moore found no justification for the discrepancy, and concluded that the cases "create doubt as to whether the Federal Circuit serves as a test of 'accuracy' of district court claim construction." Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 Harv. J.L. & Tech. 1, 21 (2001).

The Federal Circuit tried—and failed—to treat claim construction as devoid of policy. In *SmithKline Beecham Corp. v. Apotex Corp.*, the court asserted that claim construction "is not a policy-driven inquiry," rather being merely "a contextual interpretation of language." 403 F.3d 1331, 1340 (Fed. Cir. 2005) (Rader, J.). "For this precise reason," the court went on, "a court must construe claims without considering the implications of covering a particular product or process." *Id.* at 1341.

SmithKline is correct that, were accused products relevant to claim construction, then claim construction would necessarily be policy-driven. And less than a year later, *the exact same judge* wrote that patent claims "must inevitably be construed in context of the accused device." *Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.*, 442 F.3d 1322, 1327 (Fed. Cir. 2006) (Rader, J.) (characterizing *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1118 (1985)). Judge Rader proved the very thing he sought to reject: that district court claim construction is based on policy, not mere correctness.

Inconsistencies like these have drawn criticisms, explicitly stating what the Federal Circuit inevitably implies: that claim construction is driven by policy considerations. Two leading patent law treatises both reject the premise of *SmithKline*, concluding instead that patent claim construction is at least in part "based . . . on patent policy." 5A Donald S. Chisum, *Chisum on Patents* § 18.03[2][f] (2007); *accord* Robert L. Harmon et al., *Patents and the Federal Circuit* § 6.2(d)(v), at 490 (11th ed. 2013) (*SmithKline* "reached far and made some bad law"). Even a judge of the Federal Circuit bemoaned that the court's claim constructions derived from "interpretive necromancy" and that its decisions "resemble reality, if at all, only by chance." *Phillips*, 415 F.3d at 1330 (Mayer, J., dissenting) (quoting *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 833 (2002)).

Going further, commentators have concluded that "there is no single best claim meaning for a given patent claim." Thomas Chen, *Patent Claim Construction: An Appeal for* Chevron *Deference*, 94 Va. L. Rev. 1165, 1179 (2008); *accord* Dan L. Burk & Mark A. Lemley, *Fence Posts or Sign Posts? Rethinking Patent Claim Construction*, 157 U. Pa. L. Rev. 1743, 1745 (2009) ("[C]laim construction may be inherently indeterminate . . . "). Scholars have recommended that claim construction focus less on linguistic precision and more on "normative disputes over policy issues." Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 Yale L.J. 530, 536 (2013). These views further confirm that the *Phillips* claim construction standard is not "correct," but rather a measured policy response to a particular legal proceeding.

The tortured and unpredictable record of claim construction rejects the premise that the *Phillips* standard is objectively "correct." Instead, that standard is one developed to deal with specific policy concerns relevant to the specific proceeding of patent litigation. This Court should not apply that standard to *inter partes* review without considering the key differences between the proceedings.

C. The Public Interest Purpose of *Inter Partes* Review Justifies Use of a Different Standard

The above discussion raises serious questions about whether the Federal Circuit's approach to claim construction is correct at all.[6] But for purposes of this case it is sufficient to recognize that, whatever the propriety of the *Phillips* standard in litigation proceedings, the standard is highly inappropriate for the vastly different proceeding of *inter partes* review.

The government, as Respondent, correctly relies on the availability of amendments during *inter partes* review to justify application of the broadest reasonable interpretation standard. *See* Br. Resp't 17–27. The ability to amend claims has long justified application of that standard, even where that ability to amend has been procedurally limited. *See Yamamoto*, 740 F.2d at 1571–72; *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1990); 35 U.S.C. § 305 (limiting opportunity to amend in *ex parte* reexamination).

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[6] *Cf.* Andrew B. Dzeguze, *Did Markman and Phillips Answer the Right Question? A Review of the Fractured State of Claim Construction Law and the Potential Use of Equity to Unify It*, 15 Tex. Intell. Prop. L.J. 457, 489 (2007) (proposing that district courts use broadest reasonable interpretation rather than *Phillips*).

But beyond the government's justification, the explicit mandate to advance the public interest during *inter partes* review also solidifies the virtue of using the broadest reasonable interpretation, which is designed to promote the public interest in patent clarity.

While a part of the intent behind *inter partes* review was to create a new adjudicatory forum for private disputes, the "main argument" for the patent post-grant proceedings authorized by the America Invents Act was the public benefit in testing patents of "dubious validity," as such patents "can disrupt product development in a field of technology for years." Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part II of II*, 21 Fed. Cir. B.J. 539, 600 (2012) (citing statements in hearings leading to the America Invents Act). This is in accord with this Court's longstanding recognition of "the importance to the public at large of resolving questions of patent validity." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 100 (1993) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971)).

Further confirming that *inter partes* review is directed to the general public interest in patent quality and not mere resolution of private disputes: even if the parties to the proceeding settle, the Patent Trial and Appeal Board may still decide patentability. *See* 35 U.S.C. § 317(a) (permitting Board, after settlement, to "proceed to a final written decision"); 37 C.F.R. § 42.74(a) ("[T]he Board is not a party to the settlement and may independently determine any question of jurisdiction, patentability, or Office practice."). If the Board were merely an arbiter of party disputes, its power to issue decisions would terminate once that dispute was settled. That the Board may continue to decide patentability even when no party

contests it suggests that the Board acts, in such situations, in the service of the general public interest.

Part and parcel of this public concern for patent quality is the concern for patent clarity. *Nautilus, Inc. v. Biosig Instruments, Inc.* demanded that "a patent must be precise enough to afford clear notice of what is claimed, thereby apprising the public of what is still open to them." 134 S. Ct. 2120, 2129 (2014) (quoting *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 373 (1996)) (internal quotes and alterations omitted). This call for clarity counteracts the known fact that "patent applicants face powerful incentives to inject ambiguity into their claims." *Id.*[7] Countering this perverse incentive with an encouragement toward clarity will undoubtedly lead to higher quality patents.

The broadest reasonable interpretation standard encourages clarity. In perhaps the earliest decision to recognize the value of broad interpretation, the Commissioner of the Patent Office stated:

> No better method of construing claims is perceived than to give them in each case the broadest interpretation which they will support without straining the language in which they are couched. [A] claim which does not carry its true meaning upon its face misleads those affected by the patent instead of guiding them as to its true scope

[7] *See also* Michael Risch, *The Failure of Public Notice in Patent Prosecution*, 21 Harv. J.L. & Tech. 179, 180 (2007) ("Patent applicants have an incentive to keep issued patents vague because vagueness allows for ex post gaming."); *Brenner v. Manson*, 383 U.S. 519, 534 (1966) (noting "the highly developed art of drafting patent claims so that they disclose as little useful information as possible").

Podlesak & Podlesak v. McInnerney, 123 Off. Gaz. Pat. Office 1989, 1990 (1906), *available at* URL *supra* p. iv. Indeed, the Commissioner admonished against construing claims "according to the exigencies of the particular situation in which the claim may stand," *id.*—a practice remarkably like claim construction under *Phillips*, *see Wilson Sporting Goods*, 442 F.3d at 1327.

Thus, the broadest reasonable interpretation standard "serves the public interest by reducing the possibility that claims, finally allowed, will be given broader scope than is justified." *Yamamoto*, 740 F.2d at 1571. That encouragement toward clear claim drafting is a substantial justification for continued use of the broadest reasonable interpretation standard in *inter partes* review.

II. CHANGING THE CLAIM CONSTRUCTION STANDARD WILL ENCOURAGE IMPROPER BEHAVIOR IN *INTER PARTES* REVIEW

Cuozzo's preferred claim construction standard will also likely encourage undesirable and manipulative party behavior during *inter partes* review. This possibility further cautions against imposing that standard on the proceeding.

A. THE FACTS OF THIS CASE ILLUSTRATE NEEDLESS GAMESMANSHIP BEFORE THE COURTS AND PATENT OFFICE

The facts of this case exemplify how Petitioner Cuozzo has sought to manipulate the *inter partes* review proceeding to serve ends unrelated to the adjudication itself, and has sought to use the choice of claim construction standard to further that manipulation. Neither party to this case reviews these facts, so they are presented below.

Briefly, the facts reveal a strange discrepancy: the claim construction standard that Cuozzo seeks would construe claims more narrowly than the Board's current standard, and yet Cuozzo actually asks for a broader construction of its claims. That discrepancy shows that Cuozzo's reason for pursuing the change in claim construction standard cannot be to change the outcome before the Board, as the Board's invalidity decision would remain unchanged under Cuozzo's preferred standard.

Instead, Cuozzo's actual interest is in leveraging the Board to obtain a favorable construction so that Cuozzo can more easily succeed in later infringement litigation (presumably based on patent claims not invalidated by the Board).[8] Cuozzo's pursuit of this extraneous interest, going far beyond the intended purpose of *inter partes* review, is a wasteful and unnecessary use of adjudicatory resources that should not be encouraged.

1. Curiously, Cuozzo Asks for a Narrower Claim Construction Standard in Order to Obtain a Broader Construction

Although the precise contours of the two competing claim construction standards in this case are not made clear on the record of this case, one thing is certain: the district court standard cannot read a claim to be broader than the broadest reasonable interpretation. That is, any claim construed under *Phillips* cannot encompass more

[8]The Board invalidated claims 10, 14, and 17 of Cuozzo's patent. *Garmin Int'l, Inc. v. Cuozzo Speed Techs. LLC*, No. IPR2012-1, slip op. at 2 (P.T.A.B. Nov. 13, 2013) (Pet. Cert. 110a). The patent has 20 claims total, so 17 claims remain valid, including seven claims having the language being disputed in this case. U.S. Patent No. 6,778,074 col. 6, l. 23 to col. 8, l. 31 (filed Mar. 18, 2002).

products or articles than the same claim construed under the broadest reasonable interpretation. This is the plain import of the words "broadest reasonable." And Cuozzo and several *amici* rely on the broadest reasonable interpretation standard's tendency toward breadth.[9]

But that makes Cuozzo's desired outcome "puzzling," as the government put it previously,[10] because Cuozzo asks for a claim construction standard that is narrower in order to achieve a claim construction that is *broader*. That desire for breadth is made apparent in at least three places: Cuozzo's oral argument before the Board, its brief in the Court of Appeals, and its attempted claim amendment before the Board.

The patent at issue relates to a speedometer and a colored display that shows the current speed limit; the claims describe the speedometer and the colored display as "integrally attached." Br. Pet'r 6–7. Two interpretations were contemplated for the term "integrally attached": first, that the speedometer and the colored display are "discrete parts physically joined together" (a two-piece system); and second, that the speedometer and the colored display are a single component (a one-piece system). *Garmin Int'l, Inc. v. Cuozzo Speed Techs. LLC*, No. IPR2012-1, slip op. at 9–10 (P.T.A.B. Nov. 13, 2013) (Pet. Cert. 118a–20a).

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[9]*See, e.g.*, Br. Pet'r i ("Board's broad interpretation allows for differing determinations of validity"); Br. Gregory Dolin et al. 23 (Board's interpretation "artificially broadens the scope of a claim"). Although for simplicity this brief describes *Phillips* as the "narrower" standard, there is no reason that it must always be narrower. The two standards may in some—perhaps most—cases be coextensive. *See* Br. Paul R. Michel 8.

[10]Brief for Intervenor USPTO at 26, *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268 (Fed. Cir. June 5, 2014) (No. 14-1301).

While the Board ultimately construed "integrally attached" to encompass only the two-piece system, Cuozzo repeatedly argued that the claim term should encompass *both* the one-piece system and the two-piece system.[11] At oral argument before the Board, Cuozzo was asked whether its proposed construction fully encompassed the Board's two-piece construction, and Cuozzo agreed, saying that its desired construction "encompasses and is broader." Appendix B *infra* p. 3a. Even when pressed by the Board, Cuozzo steadfastly refused to admit that there was anything covered by the Board's construction but not by Cuozzo's.[12]

Cuozzo's sustained its desire for a broader claim construction through its appeal to the Federal Circuit. Cuozzo's opening brief described the Board's construction as "overly narrow," noting that the "fundamental dispute with the PTAB's construction is that it excludes" a product that Cuozzo wanted to have covered. Brief of Appellant at 33, *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268 (Fed. Cir. Apr. 22, 2014) (No. 14-1301). This again shows that increased breadth, not narrowness, was the motivation behind Cuozzo's appeal.

Finally, Cuozzo's attempted amendment confirms this desire to obtain a broader claim construction covering the one-piece system excluded by the Board. During

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[11] Specifically, the Board's construction of "integrally attached" was "discrete parts physically joined together as a unit without each part losing its own separate identity." *Id.* at 9 (Pet. Cert. 118a). Cuozzo's preferred construction was "joined *or* combined to work as a complete unit." *Id.* (emphasis added) (Pet. Cert. 119a).

[12] *See, e.g., infra* p. 6a ("[I]f the two LCDs are joined and they do work together as a complete unit, they would certainly fall under ours."); *infra* p. 8a ("Yes, I think our construction is broader than the Board's.").

the Board proceeding, Cuozzo sought to amend its patent claims to add a gloss on the claim term "a speedometer integrally attached to said colored display," such that "the speedometer comprises a liquid crystal display" and "the colored display is the liquid crystal display." *Garmin Int'l*, No. IPR2012-1, slip op. at 47 (Pet. Cert. 163a).

Such an amendment would have forced an interpretation that the speedometer and the colored display were one and the same. The antecedent basis for the phrase "the colored display is *the* liquid crystal display" is the liquid crystal display of the speedometer.[13] Thus, Cuozzo's proposed amendment would have required a construction that the colored display was part of the speedometer—the one-piece construction described above.

Accordingly, the *inter partes* review record and the Federal Circuit record both confirm that Cuozzo sought and continues to seek a broader construction of its claims. In light of this, it is indeed puzzling that Cuozzo asks for a claim construction standard that by definition cannot be broader than the prevailing standard.

2. A Broader Claim Construction Will Not Change the Validity Determination

Cuozzo cannot be seeking a broader claim construction in order to sustain the validity of its patent. Since the Board already invalidated claims under the narrower two-piece construction, Cuozzo's claims would be equally invalid under the broader one-or-two-piece construction. *See, e.g., Callaway Golf Co. v. Acushnet Co.*, 576 F.3d

[13] Antecedent basis in patent claim interpretation means that an item preceded by the word "the" must refer back and be identical to the last reference to that item. *See Pacing Techs., LLC v. Garmin Int'l, Inc.*, 778 F.3d 1021, 1023–24 (Fed. Cir. 2015).

1331, 1344 (Fed. Cir. 2009) (citing *Ormco Corp. v. Align Tech., Inc.*, 498 F.3d 1307, 1319 (Fed. Cir. 2007)). As the government noted before the Federal Circuit, "at the end of the day, Cuozzo wants a claim construction that would make its argument that the claims are patentable *harder*." Brief for Intervenor USPTO at 26, *Cuozzo Speed Techs.*, 793 F.3d 1268 (June 5, 2014) (No. 14-1301).

Indeed, at oral argument before the Federal Circuit, Cuozzo's counsel was specifically asked how the requested broader construction would change the invalidity determination, and counsel offered no response. *See* Appendix A *infra* p. 1a. In an extended colloquy, Judge Dyk repeatedly remarked to counsel that "broadening the scope of the claims doesn't solve your obviousness problem." *Infra* p. 2a. Cuozzo's attorney responded that the prior art relied upon for the obviousness finding was "distinguishable on other grounds not related to the claim term 'integrally attached' "—effectively an admission that Cuozzo's nonobviousness arguments did not turn on the construction of that term. *Infra* p. 2a. Thus, Cuozzo recognized that the obviousness determination would be unaffected by the choice of claim construction standard.

3. Cuozzo's Real Motivation Is to Obtain a Favorable Claim Construction to Facilitate Infringement Litigation

Instead, Cuozzo appears to seek a broader interpretation of its claims for a reason unrelated to this case: to establish a desirable precedent for external litigation.[14]

[14] As explained above, Cuozzo still has patent claims not invalidated and thus eligible for further litigation. *See* note 8 *supra* p. 17.

Concurrent with the *inter partes* review, Cuozzo was prosecuting four infringement cases in district court, asserting its patent against devices that used the one-piece system rather than the two-piece system.[15] The Board instituted *inter partes* review on January 9, 2013, at which time the Board construed Cuozzo's claims to be limited to the two-piece system. Decision to Initiate Trial at 8, *Garmin Int'l*, No. IPR2012-1 (Jan. 9, 2013) (Pet. Cert. 176a). Three months later, the parties in litigation moved for claim construction in the district court, with the defendants seeking a construction consistent with the Board's, and Cuozzo seeking an alternate one-or-two-piece construction. *See* Opening Claim Construction Brief of Defendants at 19, *Cuozzo Speed Techs. LLC v. Gen. Motors LLC*, No. 2:12-cv-3624 (D.N.J. Apr. 18, 2013).

As a result, Cuozzo desperately sought to have the Board change its claim construction determination. Revealingly, in its Patent Owner's Response filed with the Board after the institution decision, Cuozzo included the following footnote:

> To the extent the Board's decision on the patentability of claim 10 is not based upon the meaning of "integrally attached," Patent Owner respectfully requests that the Board either (1) find Patent Owner's proposed construction is correct and enter its finding in its Order, or (2) withdraw its preliminary construction provided in the Order.

Patent Owner's Response at 4 n.1, *Garmin Int'l*, No. IPR2012-1 (Mar. 11, 2013).

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[15]These cases were filed in the U.S. District Court for the District of New Jersey, and bear docket numbers 2:12-cv-3623 to -3626.

In other words, Cuozzo was so concerned about the implications of the Board's construction that Cuozzo asked the Board to change the construction *even if it made no difference to the Board's determination.*

Cuozzo now asks this Court to change the claim construction standard in a last-ditch effort to have the Board reconstrue the claims in a manner beneficial to Cuozzo's separate litigation—even though it will make no difference to the Board's determination. Indeed, the uncertainty of the *Phillips* standard will likely make it easier for Cuozzo to succeed in this strategic maneuver. But such a maneuver, totally divergent from the purposes of the *inter partes* review, is an abuse of the resources of both the Board and the judiciary. This Court should not countenance such manipulative tactics.

B. Petitioner's Desired Standard Would Increase Costs and Facilitate Undue Manipulation of *Inter Partes* Review

This attempt to exploit *inter partes* review to serve unrelated ends exemplifies how the district court claim construction standard will lead to greater gamesmanship and manipulation. This is due to the fact that claim construction under the district court standard is complex and unpredictable, requiring adjudicators to select among competing reasonable interpretations. *See* Section I.B *supra* p. 10.

Should this Court apply the *Phillips* standard to *inter partes* review, abusive parties could take advantage of the complexity and uncertainty of that standard in many ways. Some, like Cuozzo, might try to commandeer a proceeding to serve the interests of another one. Others might try to drag out the process, increasing costs—a

likely possibility given that claim construction is an expensive determination, with one study suggesting that it might average over $1 million in attorney fees in certain cases.[16] Still others might seek to introduce ambiguity into their claims during patent prosecution, in hopes of exploiting that ambiguity down the road should the patent be challenged in *inter partes* review. *Cf. Nautilus*, 134 S. Ct. at 2129.

These manipulative maneuvers have costs. Obviously they cost money to the parties. It would be a disappointing reversal of course to impose a million-dollar component of patent litigation on *inter partes* review, a proceeding that Congress intended to be a "quick and cost effective alternative[] to litigation." H.R. Rep. No. 112-98, at 48 (2011). And manipulative tactics like Cuozzo's tarnish the dignity of the *inter partes* review process itself. That proceeding, intended to protect industry and the public from the cloud of questionable patents, ought not become a forum for petty disputes and game-playing unrelated to the mission of the adjudicatory body.

It is the uncertainty of the district court claim construction standard that opens the door to many of these undesirable behaviors. This Court should not encourage them.

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[16] *See* RPX Corp., *NPE Litigation: Costs by Key Events* 4 (2015), URL *supra* p. ix (finding that cases involving Non-Practicing Entities terminating at a stage immediately before claim construction incurred $1.6 million in legal fees on average, while those terminating immediately after claim construction cost $2.7 million). Furthermore, the Federal Circuit reverses 30–40% of claim constructions. *See* J. Jonas Anderson & Peter S. Menell, *Informal Deference: A Historical, Empirical, and Normative Analysis of Patent Claim Construction*, 108 Nw. U. L. Rev. 1, 40 (2014). In those cases, claim construction must be repeated, multiplying the costs.

By contrast, a main virtue of the broadest reasonable interpretation standard is that it is eminently simple to apply. The adjudicator simply needs to read the patent specification and claims, consider the universe of possible interpretations, weed out those that are unreasonable, and construe the claims in a manner that encompasses the range of reasonableness. There is no need to select among multiple competing but reasonable interpretations, as courts must do under *Phillips*.

Simplicity resists manipulability. Because the broadest reasonable interpretation is more straightforward to apply, parties will find it harder to exploit ambiguity and uncertainty to serve undue ends. This allows the Board to adjudicate efficiently, free of the side battles of the parties that would otherwise drag the proceeding along.

Continuing to apply the broadest reasonable interpretation standard during *inter partes* review would not only be correct on the merits, then: it would help to ensure that this new proceeding does not become a playground for lawyers at the expense of the public and the dignity of the legal system. This provides additional reason for this Court to affirm the Court of Appeals.

III. Petitioner Likely Has No Standing to Raise the Claim Construction Question

As discussed above, Cuozzo asks this Court to apply a narrower claim construction standard to *inter partes* review, but for the purpose of obtaining a broader claim construction, one that would have no effect on the ultimate disposition of the review proceeding. This backwards fact pattern is not just puzzling; it potentially means that Cuozzo has no standing to raise the question, such that this Court lacks jurisdiction over the case.

Cuozzo obviously has standing to appeal the Board's decision; the invalidation of its patent is a redressable injury. But standing overall does not necessarily imply standing for particular questions presented; "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute *or of particular issues*." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (emphasis added). And in this case, Cuozzo has no standing over the particular issue of whether the Board applied the wrong claim construction standard.

A. Cuozzo's Injury Is Not Redressable

1. Article III limits the judicial power to "cases" and "controversies," and this Court has repeatedly interpreted that constitutional provision under the doctrine of standing. Specifically, a court may adjudicate a case only if the complaining party has established "the irreducible constitutional minimum" of three elements: injury in fact, a causal connection between the injury and the conduct complained of, and likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

The element of redressability demands that the complaining party be able to show that it "personally would benefit in a tangible way from the court's intervention." *Warth*, 422 U.S. at 508. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

2. Here, the change to the patent claim construction standard that Cuozzo seeks would not change the outcome of the *inter partes* review proceeding from which

Cuozzo appealed, and so Cuozzo lacks standing for want of redressability. Before this Court, Cuozzo has argued only—and only obliquely—that a change to the claim construction would change the Board's validity determination.[17] Yet, as explained above, Cuozzo actually seeks a broader claim construction that would be equally invalid before the Board. *See* Section II.A.1 *supra* p. 17.

The claim construction question leads to no redressability for Cuozzo for at least two reasons. First, insofar as the Board applied the *broadest reasonable* interpretation and rejected Cuozzo's *broader* proposed construction, the Board presumably found Cuozzo's construction unreasonable, meaning that it would not be applied under any standard, even Cuozzo's preferred one. *Cf. Garmin Int'l*, No. IPR2012-1, slip op. at 9 (Pet. Cert. 118a) (describing Cuozzo's construction as "illogical"). Second, because the patent claims were obvious under a narrower construction, they would also be obvious under a broader construction. *See* Section II.A.2 *supra* p. 20. Either way, the claim construction standard would have no effect on the ultimate disposition of the *inter partes* review, resolution of the issue would redress no injury to Cuozzo, and so Cuozzo lacks standing.[18]

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[17] *See* Pet. Cert. 7 ("Using [the broadest reasonable] construction, the Board found that claims 10, 14, and 17 were obvious based on the same combinations of prior art on which it had relied in instituting review. Cuozzo appealed . . " (citation omitted)); Br. Pet'r 7 (identical). Neither brief devotes more than a page and a half to discussing proceedings before the Board.

[18] Before the Federal Circuit (but not this Court), Cuozzo argued that the claim construction standard was relevant to the Board's denial of Cuozzo's motion to amend the patent claims. *See, e.g.*, Reply Brief of Appellant at 21 n.1, *Cuozzo Speed Techs.*, 793 F.3d 1268 (June 23, 2014) (No. 14-1301); oral argument transcript *infra* p. 2a. But the Board denied the motion to amend based on a written description

Standing might be salvageable were Cuozzo to propose a claim construction that would actually make a difference to the validity of its patent. Cuozzo alluded to this possibility briefly in oral argument before the Board (though only after seven transcript pages of leading questions from the judges). *See infra* p. 13a. But Cuozzo offered no elucidation on how exactly the proposed construction might be narrower, and in any event made no effort to argue the point before the Federal Circuit or this Court. To the extent that this possibility can confer standing,[19] additional briefing would be required to explain what claim construction Cuozzo seeks exactly, how this construction would change the outcome, and how the *Phillips* standard would arrive at that construction rather than the uniformly broader one that Cuozzo has relied upon thus far.

B. Dismissal Would Comport with the Rationale for the Standing Doctrine

A dismissal for lack of standing would not be a mere technicality in this case, but rather would advance the fundamental values behind the standing requirement it-

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defect under 35 U.S.C. § 112(a). *See Garmin Int'l*, No. IPR2012-1, slip op. at 48 (Pet. Cert. 165a). This defect would still be fatal to the motion to amend even under Cuozzo's preferred claim construction standard, so again there would be no change in result.

[19] And it is likely that this effort will fail to confer standing as well. The narrowing of the claim construction that Cuozzo sought was to overcome a prior art reference known as Awada. *See infra* p. 13a. But Cuozzo's patent was invalidated over three different prior art references, known as Aumayer, Evans, and Wendt. *See Cuozzo Speed Techs.*, 793 F.3d at 1282 (Pet. Cert. 27a). The record reveals no reason why an alternate claim construction would overcome this obviousness determination.

self. Courts require standing for suit to ensure that their opinions are not advisory and, more importantly, unadvised. Standing "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic application of the consequences of judicial action." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973); *Warth*, 422 U.S. at 499; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974).

Here, the *inter partes* review fails to provide that "concrete factual context" necessary for this Court, or any court, to decide the proper standard of claim construction. As explained above, Cuozzo seeks a claim construction standard that is narrower than the one that the Board applied, and yet hopes to use that narrower standard to obtain a broader claim construction. *See* Section II.A.1 *supra* p. 17. That reversal of the ordinary facts fails to illustrate any concrete difference between the two claim construction standards, forcing the courts' analysis to revert to abstract theories of patent law.[20] Petitioner Cuozzo thus asks this Court precisely "to decide abstract questions of wide public significance" even though they are "unnecessary to protect individual rights." *Warth*, 422 U.S. at 500.

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[20]Thus, even if Cuozzo does have standing, this Court should dismiss the writ of certiorari as improvidently granted, to "await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959).

Highlighting the extent to which the record is devoid of concrete facts is the reliance of numerous *amici* on advisory dicta in *PPC Broadband, Inc. v. Corning Optical Communications RF, LLC*, No. 15-1361 et al., 2016 WL 692368 (Feb. 22, 2016). In that case, the Federal Circuit heard an appeal of an *inter partes* review and construed the patent at issue under both *Phillips* and the broadest reasonable interpretation, reaching a different interpretation for each standard. *See id.* at *5. The decision has been held up as the "poster child" for how the two standards differ. *E.g.*, Br. Licensing Executives Society 15.

But *PPC*'s application of *Phillips* was wholly advisory. Being an appeal from an *inter partes* review, the outcome turned only on the broadest reasonable interpretation result; the *Phillips* construction was immaterial. *See PPC*, 2016 WL 692368, at *2–3. And that latter construction was not based on a prior adversary-argued decision; instead, the court engaged in its own *sua sponte* analysis. *See id.* at *4. The decision will bind no future courts, who are free to construe the claims differently under *Phillips*. *Cf. CVI/Beta Ventures*, 112 F.3d at 1160 n.7 (discussed *supra* p. 10). Indeed, it is hard to discern any reason why the court spent 1,215 words of its opinion explicating the difference between the standards and construing the claims in detail, when the result of that lengthy analysis had no effect.

PPC's conclusions about the differences between the two standards are thus advisory opinions, observations "unnecessary to the decision, and in that sense *extra judicial*." *Hans v. Louisiana*, 134 U.S. 1, 20 (1890); *see also* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1267–68 (2006) ("Particularly to be feared is the scholarly, treatise-type

opinion, which for no good reason lectures on the nature and origins of the doctrine, making pronouncements that have no consequence for the dispute."). That *amici* citing it rely not on the facts of the present case, not on the concrete facts of another case, but rather on advisory dicta of the Federal Circuit demonstrates how lacking and abstract the record before this Court actually is.

No doubt there is great interest in resolution of the question, as demonstrated by the numerous *amicus* briefs filed in this case and with the Federal Circuit previously. But Article III "is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party has to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787." *Valley Forge*, 454 U.S. at 476. Before it decides the right standard for claim construction during *inter partes* review, this Court must have before it a case that presents the actual difference between the competing standards. This is not that case.

CONCLUSION

For the foregoing reasons, this Court should dismiss the case for lack of jurisdiction, dismiss the writ of certiorari as improvidently granted, or affirm the Court of Appeals.

Respectfully submitted,

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March 2016

APPENDIX A
EXCERPT OF ORAL ARGUMENT BEFORE THE FEDERAL CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE: CUOZZO SPEED TECHNOLOGIES, LLC,
Appellant.

No. 2014-1301

Oral Argument Held: November 3, 2011

* * *

MR. SALMON, *for the appellant Cuozzo Speed Technologies, LLC*: The second error the Board made in its final written decision was with regard to the construction of the claim term integrally attached. The Board made – The Board's interpretation was based on the examining –

JUDGE DYK: The preferred embodiment described in the specification is within the scope of the claims?

MR. SALMON: The preferred embodiment, yes, is within the scope of the claims.

JUDGE DYK: Well, your argument is that the LCD embodiment described is also within the scope of the claims.

MR. SALMON: Correct, your Honor.

JUDGE DYK: Well, how does that help you on the obviousness question? If the claims are broad enough to cover the preferred embodiment, and if the preferred embodiment is obvious, then don't you lose?

MR. SALMON: Well we think that the references cited in the institution decision are distinguishable on other grounds. We're not–

JUDGE DYK: But how does it help you to include something else within the scope of the claims, if what every-

body agrees is within the scope of the claims is obvious? It doesn't have to – the claims – to lose on obviousness, doesn't have to be that every embodiment is obvious, it just has to be that some embodiments are obvious and included within the scope of the claims. No?

MR. SALMON: That's right, but we don't agree. We think that the references cited by Garmin in the petition were distinguishable on other grounds not related to the claim term "integrally attached."

JUDGE DYK: But – but that's fair enough. You have that argument. But I just don't understand how the claim construction helps you in your argument against obviousness, because all the claim construction does here is broaden the scope of the claims. And broadening the scope of the claims doesn't solve your obviousness problem.

MR. SALMON: But the Board – the court has to come to the correct claim construction for the motion to amend practice. The motion to amend is something separate where the patent owner had the opportunity to make a motion to file substitute claims, and at that –

JUDGE DYK: So this claim construction issue is really relevant to the motion for leave to amend, because your theory is if the original claim scope under the specification includes the LCD embodiment, it's permissible for you to carve that out and submit that as a new claim in the course of the proceeding, right? Because it's not a broadening claim.

MR. SALMON: Correct, it's not a broadening claim, and yes, it's relevant to the motion to amend issue. But we think that the references are distinguishable from the claim – the original claims, under the references cited by the Board.

APPENDIX B
EXCERPT OF ORAL ARGUMENT BEFORE THE PATENT TRIAL AND APPEAL BOARD

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GARMIN INTERNATIONAL, INC. et al.,
Petitioner,

v.

PATENT OF CUOZZO SPEED TECHNOLOGIES, LLC,
Patent Owner

Case IPR2012-00001
Patent 6,778,074

Final Hearing Held: August 16, 2013

* * *

JUDGE LEE: Does your – looking at your slide 3, does your construction exclude the Board's or is it broader and different and encompasses the Board's interpretation?

MR. CONNOR, *for the patent owner*: It encompasses and is broader because the last portion of the preliminary construction here without each part losing its own separate identity is really – that is definitely not in ours. That is a limiting language that is not in what we think is seen as the broadest reasonable construction.

JUDGE LEE: So according to your interpretation, there may be an integral display or they may be two separate displays but in the same frame, therefore attached as one unit. It would cover both.

MR. CONNOR: They have to be integrally attached to works as a complete unit. And to work as a complete unit in the context of claim 10 means that it has to be able to

convey the information that is recited in the claim to the driver.

JUDGE LEE: Well, that sounds like you would exclude the Board's interpretation. Because we just require integral, meaning they are both within the same frame, immovable, relative to each other, in close proximity. That would be integrally attached. But it would not be under yours.

MR. CONNOR: Well I think the difference is whether that is referring only to the structural aspect of the combination of elements or the functional. And that is why I mentioned earlier that it is important that both the functional and structural aspects of the claim are reflected in the construction.

JUDGE LEE: So it sounds like you would exclude the Board's. It is not encompassing. It is mutually exclusive.

MR. CONNOR: No, I think our construction could certainly encompass something that doesn't lose its separate identity, whatever that may be. But the way we view the distinction between these two, the relationship between these two constructions is that the Board's is much narrower. The Board's is much narrower because it requires this maintenance of some identity, which could be characterized and it is in a lot of the briefing as the ability to take these things apart and still have –

JUDGE LEE: Yes, I understand. But our interpretation would cover something that yours do not.

MR. CONNOR: I don't think that is right. I think that ours would cover, but is not limited to, discrete parts physically joined together.

JUDGE LEE: Well just take that example, two LEDs under a single frame. That would be integrally attached under our construction but it would not be under yours.

MR. CONNOR: Two LCDs?

JUDGE LEE: Right.

MR. CONNOR: It depends on the relationship between those LCDs. I can see – I can imagine LCDs that have, now they have transparent LCDs so that you can overlay them on top of each other.

JUDGE LEE: No, like two separate. Two images side by side, one showing the speed, one showing lights up whenever you are over your speed limit. But they are attached to each other because they are in the same frame. So that would meet our test but it would not meet yours.

MR. CONNOR: If they are in the same frame, then–

JUDGE LEE: And contiguous with no other parts in-between. It is a direct connection that could even be melded together but two separate displays; one showing one thing, the other showing the other. It definitely meets ours but it doesn't appear to meet yours.

MR. CONNOR: I don't think it would meet yours because those things, without knowing whether they are maintaining their own separate identity.

JUDGE LEE: What do you mean? We could look at it. We can see two LCDS. One is one, the other is the other.

MR. CONNOR: So two separate screens sort of glued together.

JUDGE LEE: Exactly.

MR. CONNOR: Well then we have to decide in the rest of the context of the claim whether that, to know whether that is within the scope of that claim, we have to perform the infringement analysis.

JUDGE LEE: No, no, no. Just looking at these two sets of claim interpretation, we don't need to look at anything else. I just gave you an example of where it meets our definition but it does not meet yours.

MR. CONNOR: I don't think that that is a fair conclusion because if the two LCDs are joined and they do work together as a complete unit, they would certainly fall under ours. So if you have two together, let's say for example the image of a speedometer is spread across both of the LCDs. So like you have two –

JUDGE LEE: Well let's keep the pathological case. Minimal relationship. One is just showing the regular speedometer. The other one just lights up with nothing on it. It just turns red when you are over the speed limit.

MR. CONNOR: That is similar to what Nagoshi discloses. Nagoshi discloses –

JUDGE LEE: Does it meet your definition?

MR. CONNOR: Not if integrally attached.

JUDGE LEE: So that is what I am saying. It meets ours but it does not meet yours. So yours and ours are mutually exclusive. Yours is not just broader. In other words, it is just different.

MR. CONNOR: Well I don't think that it comes down to – I don't think you can distinguish between those things based only on this particular language because with Nagoshi, you have got – they are meaningless apart.

And so taking your example, where you have a light that lights up in one LCD and you have the speed displayed on the other, using their own separate identity requires that they have got to – apart they have to be able to do what they are intended to do. They have got to have their identity.

The colored display that is just flashing red without the speedometer readout, it doesn't tell you anything about the speed limit. It needs the display of the speedometer in order to have its identity because the identity of the colored display is displaying the speed

limit. And a blinking red screen with nothing else, just like a rotating filter in space, can't have its identity.

JUDGE TIERNEY: So let me back up for a moment. Under your definition, you can lose your separate identity.

MR. CONNOR: We don't even think that is a requirement of ours. It could happen. We don't see any support for that limitation.

JUDGE TIERNEY: I am looking at your arguments on page six of your brief and the response. And your definition of the word attached was: connected or joined to connect as an adjunct or associated part. On your definition, if they lose their identity, how are they still an adjunct or associated part? They are no longer associated or adjunct, I would presume.

MR. CONNOR: Well I think that they would be because if you have one part that is a component of another, which is the way the speedometer is described in the specification. The speedometer is described as having the colored display as a component of it. So you can have those two components be attached. Attached is just another way of saying – is a narrower way of saying it is including. So we have including, attached, integrally attached.

JUDGE TIERNEY: But according to your – under your definition, they have lost their identity. So how is there still an attachment under your definition? There is no beginning and end. It is just continuous one part.

MR. CONNOR: No, they would still maintain their identity. If that were the touchstone, you would still have, for example, the speedometer having an axle or having a cable in the housing.

JUDGE TIERNEY: Then how is that different than the definition we propose, where you have a distinct identity still? You retain an identity and you have attached it to.

MR. CONNOR: Because in the example we were just talking about with the lights next to the speedometer, those things lose their identity – well the colored display loses its identity without the speedometer display. So if you don't have lights that light up at a certain time, and without any other information conveyed to the driver, don't tell the driver what the speed limit is, it merely gives the warning.

On the contrary, the way that Cuozzo describes and claims his invention, he has got both of those things integrally attached in order to continuously update. So in the full context of the claim, you have got these two pieces that have a structural and functional relationship. The structural relationship is that they are joined together and functionally they work as a complete unit. In the example, I think in the question that you are asking, do you have – you don't necessarily have that functional unification if all you have are two pieces that are attached in maintaining their identity. Those pieces don't necessarily have any identity without the other.

JUDGE LEE: Right, so that is why I think your thing is not just broader. Your definition is just different. So if I could just try again. Is your definition met in every instance the Board's definition is met? It should be a simple yes or no answer.

MR. CONNOR: Yes, I think our construction is broader than the Board's.

JUDGE LEE: No. Is your definition met in every instance the Board's definition is met?

MR. CONNOR: In other words, is it completely subsumed in –

JUDGE LEE: No. It is just my question is just phrased that way. It should be a simple answer.

MR. CONNOR: So the answer is yes, –

JUDGE LEE: Alright, thank you.

MR. CONNOR: – because we don't have the extra limitation on there. So we don't require those parts maintaining their separate identity.

JUDGE LEE: Okay.

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On Rebuttal

MR. MUDD, *for the petitioner Garmin International, Inc.*: May it please the Board?

JUDGE LEE: Yes. Before you start, it appears that the patent owner didn't really raise or present their motion to amend. So do you think there is any reason for you to get into that part of it?

MR. MUDD: Well, Your Honor, I was contemplating asking Mr. Connor before I got up to see if he wanted to, at least, use maybe five minutes or so to introduce the amended claims before we address them.

JUDGE LEE: Yes, but the fact is they didn't present it. So unless you have some special reasons, there is no reason for you to get into the motion to amend.

MR. CONNOR: Well, Your Honor, may I speak on that? If the Board wishes for us to go ahead and address that now, I am happy to use some of our rebuttal time to do that.

JUDGE LEE: Is that what you would like to do?

MR. CONNOR: I would prefer to do that, rather than not present anything.

JUDGE TIERNEY: Just to make it quick, the reason we are asking–it says rebuttal, but there is nothing to rebut as it wasn't presented.

MR. CONNOR: Sure.

JUDGE TIERNEY: So we would be happy to have you speak, if you wish, to speak to that in your motion to amend.

MR. CONNOR: I would. There are three points that I want to make on those points.

MR. MUDD: Thank you.

MR. CONNOR: So I'll be brief. And I think of the three things that we bear the burden on, Your Honor, no broadening, that our claims are well supported, and that we overcome the order. I think we have really talked about the broadening quite a bit in the context of claim construction. Those two issues are really flip sides of the coin. I am happy to answer any questions. But otherwise, we just want to point out one issue.

You know taking the argument that Garmin makes on broadening, which is again a lot more of the claim construction argument here, it is inconsistent with their own arguments on the Aumayer, for example, reference, and the infringement or invalidity issue there. Because Aumayer, they are saying, couldn't possibly be shown a single speed reading in red once the speed reading exceeds the speed limit. Now they are saying that is outside the scope of the original claims.

The Aumayer reference, just like Tegethoff and some others, does exactly something similar to that. It shows a tick mark where the speed limit is. It shows a single speed reading and it illuminates it in red. So even by their own logic, there is no broadening here. We have explained that in our briefing and we rely on that for that. With respect to overcoming the art, again on the disclosure, we have laid out –

JUDGE LEE: I'm sorry. The broadening occurs where the original claim did not read on the art but because of

your amendment it now reads on the art. There is a broadening.

MR. CONNOR: Yes.

JUDGE LEE: So I am just responding to your saying that there is no broadening. Would you like to address that? If the original claims, un-amended, did not read on the reference, but because of your amendment, suddenly it now reads on the reference, isn't that by definition a broadening of the claim scope?

MR. CONNOR: That is certainly what that means. But then we get right back to the issue of how to construe integrally attached. Because the conclusion that is reached by the application that Garmin made of the Board's preliminary construction leads to a conclusion that you cannot have one LCD that is showing the speed and the speed and the colored display. And of course our amended claims specifically recite that the colored display of the speedometer, which is described in claim 18 is the LCD of claim 12, which is a colored display. So our amended claim brings those together.

JUDGE LEE: So if we adhere to our original claim interpretation, then the new claims would be broadening.

MR. CONNOR: Not necessarily, and here is why: remember when we talked about what constitutes a speedometer? We said that it is the display but it is also a lot of other components. So you can have the speedometer with an LCD display. Now remember, the LCD is just one part of the speedometer. It has also got a speedometer cable. It may have power supply. It may have other things, but it has an LCD that is part of it. And that LCD is displaying the speed. So those two things can be integrally attached and by the Board's preliminary construction, they would be integrally attached, they would still

have their same identity because the speedometer still has the cable, it still has all of the things that it needs to –

JUDGE LEE: No, but it wouldn't be a speedometer without the LCD because it has no display.

MR. CONNOR: Well, then we are interpreting the preliminary construction. Because if that is what maintain the identity of each of those parts means, then there is no support for that in specification.

JUDGE COCKS: I want to follow up on Judge Lee's question. Can a speedometer be a speedometer without a display?

MR. CONNOR: It can't be a speedometer with just the display. So I would say –

JUDGE COCKS: Well that is not what I asked. Can it be one without a display?

MR. CONNOR: It has to display the speed. I would agree.

JUDGE COCKS: So it has to have a display.

MR. CONNOR: It has to display it somehow, yes. It doesn't necessarily have to have the displays that we have in the embodiments. It can display in some other fashion. But yes, I think that is what the specification teaches. That is what a speedometer is. It is the thing that measures the speed and displays it. What I am suggesting is that there can be a shared component of the speedometer.

JUDGE LEE: But even under our interpretation, we don't exclude sharing. But you can't share the most essential piece, such that you lose your identity. And the two components can share secondary parts without losing their identity. So if you are saying that under our view two parts can't share anything, that is not what our

interpretation is. You can't share so much that everybody loses their identity is what our interpretation is.

MR. CONNOR: Well, I would submit that it is helpful to understand that, but that is not what that says. We don't have any guidance from the specification or the file history as to why these two things were maintaining these separate identities and what that would really mean. What we do know is that they need to work as a complete unit. They need to be unified, which is what integrated means.

And, to that point, earlier when Your Honor asked if there was anything that would be covered by the Board's preliminary construction that would not be covered by our proposed construction, after thinking about it and giving you that answer, I want to clarify I am not sure that my answer is entirely accurate, because, to the extent that the construction that is preliminarily, the Board's preliminary construction would covered Awada, then of course that is not within it. Because that is why Cuozzo added that language.

JUDGE LEE: Can you give us a revised answer? I really would like to know the answer to that. Is it yes or no? Is there any instance where our construction would be satisfied that – I mean, your construction would be satisfied in every instance our construction would be satisfied. Is that a yes or a no?

MR. CONNOR: No, because your construction would include Awada.

JUDGE LEE: Right, so yours is not simply broader than ours.

MR. CONNOR: It has to be because that is what Cuozzo put that language in to do, to teach away from Awada.

JUDGE LEE: Okay, thank you. So it is fair to say yours is not simply broader. It is just different. It might exclude something.

MR. CONNOR: Yes. I mean, understanding more about the Board's preliminary construction, if that encompasses what is shown right here at the bottom left is Awada, then it can't. That would be basically trying to recapture claim scope –

JUDGE LEE: Thank you.

MR. CONNOR: – that Cuozzo amended away.

JUDGE LEE: Thank you.